BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

TIMOTHY VIRL KROB Claimant V. **UTECH LARNED LUBE & TIRE** Respondent AND **LIBERTY INSURANCE CORPORATION** **DEPOSITORS INSURANCE COMPANY** Insurance Carriers	)	Docket No. 1,023,003
TIMOTHY VIRL KROB Claimant V. **NOKES HAY SERVICE** Respondent AND **RIVERPORT INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,068,539

ORDER

Respondent, Nokes Hay Service, and its insurance carrier (Nokes), through Ronald J. Laskowski, of Topeka, request review of Administrative Law Judge Bruce E. Moore's January 20, 2015 preliminary hearing Order. R. Todd King, of Wichita, appeared for claimant. Utech Larned Lube & Tire (Utech) and Liberty Insurance Corporation, appeared by Karl Wenger of Kansas City. Utech and Depositors Insurance Company appeared by Jeffrey Brewer of Wichita.

The record on appeal is the same as that considered by the judge and consists of the January 20, 2015 post-award and preliminary hearing transcript, court-ordered reports from Paul S. Stein, M.D., and John R. Babb, M.D., and all pleadings contained in the administrative file.

ISSUES

The judge ordered the three insurance carriers for the two respondents to provide claimant medical treatment. Nokes appealed and argues the judge erred because claimant did not prove personal injury arising out of and in the course of his employment and did not prove his accident was the prevailing factor in his need for medical treatment. Utech did not appeal the Order or file a brief.

Claimant "brings no argument" against Nokes' position regarding compensability.[1] Claimant notes that once Nokes' arguments regarding compensability are addressed, the only remaining issue concerns a non-appealable ruling for medical treatment. Claimant maintains the Order against Utech be affirmed. Claimant argues the Board lacks jurisdiction to consider the judge's decision to award medical treatment against Utech after a post-award preliminary hearing.[2]

The issues are:

1. Does the Board have jurisdiction to hear Nokes' appeal?

2. Did claimant prove personal injury arising out of and in the course of his employment with Nokes, including the "arising out of" requirement that his accident be the prevailing factor in his injury and medical condition?

FINDINGS OF FACT

Claimant has two separately docketed cases. Docket No. 1,023,003 concerns a January 22, 2005 right knee injury that was settled on December 13, 2005 for a 56.6% right leg impairment, with all future rights left open, including medical treatment.

Docket No. 1,068,539 concerns an asserted January 8, 2014 accident in which claimant alleges right knee, left hip and low back injuries.

On May 15, 2014, the judge ordered an independent medical examination (IME) of claimant in both cases with Paul S. Stein, M.D. Such doctor was to address diagnosis, treatment recommendations and questions relating to causation, including: (1) if the January 8, 2014 accident was the prevailing factor in claimant's injuries or need for treatment and (2) whether claimant's current need for medical treatment was the natural and probable consequence of his January 22, 2005 accident.

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[1] Claimant's Brief at 2.

[2] No party appealed the order as against Utech. The ruling against Utech in Docket No. 1023,003 is unaffected by the foregoing decision.

Dr. Stein evaluated claimant on June 24, 2014. Dr. Stein indicated claimant had degenerative disease in his right knee and likely had degeneration in his lumbar spine. He generally deferred on addressing causation pending MRI scans of claimant's right knee and lower back, in addition to low back x-rays.

Claimant had the right knee MRI on August 13, 2014. Dr. Stein, in a September 9, 2014 report, indicated he could not tell from the MRI if claimant had a degenerative change to his ACL or a tear from an injury, but noted all other findings on the MRI scan were degenerative. Dr. Stein recommended referral to an orthopedic doctor for examination of claimant and review of the MRI films.

During a September 29, 2014 telephone conference with the judge, the parties agreed to send claimant to John R. Babb, M.D. Accordingly, the judge ordered an IME with Dr. Babb and asked him to address the same issues Dr. Stein was previously asked to address.

Dr. Babb evaluated claimant on November 24, 2014. Claimant complained to Dr. Babb of left hip pain, low back pain going into his hips, right knee pain and left knee pain, which claimant believed was secondary to limping ever since having surgery on his right knee in 2005. Dr. Babb reviewed extensive medical records, conducted lumbar and bilateral knee x-rays and examined claimant. Dr. Babb diagnosed claimant with: (1) low back pain with spondylosis and myofascial pain; (2) left hip pain likely coming from his low back and not his hip joint; (3) right knee pain with severe osteoarthritis; and (4) left knee pain with moderate osteoarthritis and patellar chondromalacia.

Dr. Babb recommended claimant have a total right knee replacement. For claimant's left knee, he recommended a cortisone injection and a brace. For claimant's low back and left hip pain, Dr. Babb recommended a lumbar corset, physical therapy, a possible lumbar MRI and possible lumbar epidural steroid injections.

Dr. Babb's report states claimant's date of injury was January 8, 2014. Dr. Babb noted claimant's right knee pain was not related to the January 8, 2014 injury, but rather to his preexisting severe arthritis and his right knee pain was the natural and probable consequence of his January 22, 2005 injury. Dr. Babb opined the prevailing factor in claimant's left knee pain was an aggravation of underlying osteoarthritis and not the work injury. Dr. Babb concluded the work injury likely aggravated claimant's preexisting lumbar spine degenerative disease. He opined the prevailing factor for claimant's low back pain was his preexisting degenerative disease and not the work injury.

In a December 19, 2014 email, counsel for Utech and Liberty asked the judge for permission to either send Dr. Babb a letter or take his testimony for the purpose of determining if claimant would need right knee surgery irrespective of the 2005 accident. Such email implied Nokes was not responsible for claimant's right knee treatment.

Claimant's attorney, in a January 13, 2015 email to the judge, stated Dr. Babb's report apparently linked claimant's need for right knee medical treatment to the 2005 accidental injury. Claimant's attorney further indicated Dr. Babb's deposition had not been scheduled. He requested an order for medical treatment.

In a January 20, 2015 Order, the judge stated in part:

> After considering the medical exhibits, testimony presented, and remarks of counsel, the court took the matter under advisement and Ordered an IME through Dr. John Babb.
>
> The court has now received and reviewed Dr. Babb's IME report, as well as comments of counsel. Upon review of the record compiled to date, the court enters the following Orders:
>
> Claimant is entitled to medical care. Dr. Babb is designated as the authorized treating physician.
>
> Costs of these proceedings and benefits awarded herein are taxed jointly and severally to the insurance carriers Riverport, Liberty and Depositors.

Thereafter, Nokes filed a timely appeal.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[3] The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.[4]

K.S.A. 2013 Supp. 44-508 provides:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

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[3] K.S.A. 2013 Supp. 44-501b(b).

[4] K.S.A. 2013 Supp. 44-501b(c).

. . .

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

. . .

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-534a(a)(2) states in part:

Upon a preliminary finding that the injury to the employee is compensable . . ., the administrative law judge may make a preliminary award of medical compensation . . . to be in effect pending the conclusion of a full hearing on the claim, except that if the employee's entitlement to medical compensation . . . is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.

The Board's review of preliminary hearing orders is limited to allegations that a judge exceeded his or her jurisdiction,[5] including review of jurisdictional issues listed in K.S.A. 2013 Supp. 44-534a(a)(2): (1) did the worker sustain accidental injury or injury by repetitive trauma; (2) did the injury arise out of and in the course of employment; (3) did the worker provide timely notice; and (4) do certain other defenses apply. "Certain defenses" refer to defenses which dispute the compensability of the injury.[6]

K.S.A. 2013 Supp. 44-555c(a) states, in part:

> The board shall have exclusive jurisdiction to review all decisions, findings, orders and awards of compensation of administrative law judges under the workers compensation act. The review by the appeals board shall be upon questions of law and fact as presented and shown by a transcript of the evidence and the proceedings as presented, had and introduced before the administrative law judge.

ANALYSIS

The Kansas Workers Compensation Act permits an order for medical treatment following a preliminary hearing. Based on K.S.A. 2013 Supp. 44-534a(a)(2), any such order for medical treatment is contingent on the case being compensable. While the Order does not explicitly comment on compensability, implicit in an order for medical treatment is a required finding of compensability, i.e, claimant proved personal injury arising out of and in the course of his employment with Nokes, including that his accident was the prevailing factor in his need for medical treatment. Therefore, the Board has jurisdiction to hear this appeal.[7]

The evidence does not establish, more probably than not, that claimant's January 8, 2014 accident was the prevailing factor in his injuries or medical conditions. Dr. Babb stated the prevailing factor for each of claimant's various injured body parts was not the asserted January 8, 2014 work injury, i.e. the "accident," but rather preexisting conditions. Dr. Babb opined claimant's current right knee condition was the natural and probable consequence of the January 22, 2005 injury. The current evidence shows claimant's need for medical treatment for his right knee stems from the 2005 injury. The current evidence does not establish, more probably than not, that claimant needs medical treatment as a result of the asserted 2014 accidental injury.

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[5] K.S.A. 2013 Supp. 44-551(l)(2)(A).

[6] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

[7] See *Gonzales v. Hiland Dairy Company*, No. 1,062,244, 2012 WL 6811302 (WCAB Dec. 26, 2012); *Wilson v. Liquid Environmental Solutions*, Nos. 1,056,730 & 1,056,731, 2012 WL 3279501 (WCAB July 6, 2012); *Daugherty v. Daugherty Pumping, LLC*, No. 1,042,230, 2011 WL 494965 (WCAB Jan. 7, 2011); and *Thomas v. Pit Stop Liquor*, No. 1,050,591, 2010 WL 4963618 (WCAB Nov. 17, 2010). No party contests the Board's jurisdiction to consider Nokes' appeal in Docket No. 1,068,539.

CONCLUSION

WHEREFORE, this Board Member reverses the preliminary hearing Order in Docket No. 1,068,539 to reflect Nokes Hay Service and Riverport Insurance Company are not liable for claimant's medical treatment. Otherwise, the preliminary hearing Order in Docket No. 1,023,003 is in full effect as against Utech and the two remaining insurance carriers.

IT IS SO ORDERED.

Dated this _____ day of March, 2015.

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HONORABLE JOHN F. CARPINELLI
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